Supreme Court, U.S.
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No. 92-802

In The

# Supreme Court of the United States

October Term, 1992

JAMES O'LEARY,

*Petitioner,*

v.

CITY OF SACRAMENTO,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of The United States**

## OPPOSITION TO PETITION FOR CERTIORARI

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## QUESTION PRESENTED

1. Whether the dismissal of a complaint without prejudice should be reviewed by this Court upon a petition for a writ of certiorari.

## PARTIES INVOLVED

The only parties to the case at bar are petitioner James O'Leary and respondent City of Sacramento.

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## RELEVANT STATUTES

Respondent submits that the following statutes are relevant to the disposition of the instant petition:

**28 U.S.C. section 1254:**

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**28 U.S.C section 1291:**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and 1295 of this title.

## STATEMENT OF THE CASE

Petitioner O'Leary, a pro se litigant, inappropriately requests this Court to review an order whereby the district court dismissed petitioner's complaint without prejudice.

Since March 1989, the United States District Court for the Eastern District of California has considered petitioner O'Leary to be a vexatious litigant. 3a, *infra*. This finding was made in light of petitioner O'Leary's filing of "numerous pro se actions in [the district court] over recent years" which, with respect to the City of Sacramento, "constitute[] an abuse of the judicial process." 1a, 2a, *infra*. Upon being found to be a vexatious litigant, petitioner O'Leary was ordered to post a bond in the amount of $1,450 if he wished to file "any documents or cases concerning a First Amendment challenge to the name 'Sacramento.' " 3a, *infra*. Petitioner O'Leary never challenged this order in a timely manner.

In July 1991, petitioner O'Leary filed the instant challenge regarding the use of the name Sacramento, claiming that Sacramento's city seal somehow infringes upon his First Amendment rights. Petitioner O'Leary requests $11,000,000 in damages in addition to injunctive relief barring respondent City of Sacramento from the use of its city seal.

On July 24, 1991 the Honorable William B. Shubb, Judge of the United States District Court for the Eastern District of California, determined that petitioner O'Leary's latest challenge to the name Sacramento was within the scope of the court's March 1989 order. 4a, *infra*. Accordingly, Judge Shubb entered an order dismissing petitioner O'Leary's complaint "without prejudice to

refile the complaint within 10 days" upon posting a bond in the appropriate amount. 4a, *infra.*

Although petitioner O'Leary subsequently filed the vexatious litigant bond, he did not refile his complaint. Rather, petitioner O'Leary thereafter embarked upon a series of baseless appeals. 6a, 7a, *infra.* The Ninth Circuit dismissed the appeal for lack of jurisdiction in April 1992. 6a, *infra.* Thereafter, in response to petitioner O'Leary's new series of filings with the Court of Appeals, the Ninth Circuit ordered the appeal closed and directed the Clerk of the court to accept no further filings in the matter. 7a, *infra.*

Respondent City of Sacramento respectfully submits that the district court's July 1991 order is not a final, appealable order. 28 U.S.C. § 1291. Accordingly, the instant petition should be denied.[1]

## REASONS FOR DENYING CERTIORARI

### I. THE INSTANT PETITION RAISES NO CONSTITUTIONAL ISSUES

The principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See, *Braxton v. United States,* ___ U.S. ___, 111 S.Ct. 1854, 1957, 114

[1] This petition was docketed in this Court effective June 18, 1992. Respondent City was not served and did not receive a copy of the petition until December 2, 1992.

L.Ed.2d 385, 391 (1991). As discussed below, petitioner O'Leary did not perfect federal appellate jurisdiction and the instant petition presents no conflict requiring resolution by this Court.

### A. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT WITHOUT PREJUDICE IS NOT AN APPEALABLE ORDER

It has long been the rule that the dismissal of a complaint which does not dismiss the entire action cannot be appealed. In the instant case, the district court ordered only that petitioner O'Leary's complaint be dismissed without prejudice and, further, granted petitioner O'Leary permission to refile his complaint. 4a, *infra*. Clearly, the district court's order did not dispose of the claims of any party to this action and, therefore, federal appellate jurisdiction has never attached.

Pursuant to 28 U.S.C. section 1291, the courts of appeal "have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Under section 1291, a final decision is one which, by its own force, terminates the case on the merits as to all the parties and leaves nothing further to be done. See, e.g., *Weingartner v. Union Oil Co. of California*, 431 F.2d 26, 27 (9th Cir. 1970), cert. denied, 400 U.S. 1000 (1971); *Eason v. Dickson*, 390 F.2d 585, 587-88 (9th Cir.), cert. denied, 392 U.S. 914 (1968); *Resnick v. La Paz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961). The effect of section 1291 is to disallow appeals from any decision which is tentative, informal or

incomplete. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Thus, so long as the matter remains open, unfinished or inconclusive, there may be no appeal. *Id.*[2]

An order which dismisses a complaint without expressly dismissing the action is not, except under special circumstances, an appealable order. *Ruby v. Secretary of the United States Navy*, 365 F.2d 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967); *McAfee v. Gray*, 201 F.2d 109 (9th Cir. 1953). In *Ruby*, supra, the plaintiff sought a declaration that he was entitled to a discharge from the Navy. Upon the district court's granting of the defendant's motion to dismiss the complaint, the plaintiff appealed. The Secretary of the Navy then moved to dismiss the appeal on the basis that the district court's order did not dismiss the action and, therefore, was not a final appealable decision. *Id.* As the Ninth Circuit found, the order, which did not expressly dismiss the action, was not appealable. *Id.*

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[2] The *Cohen* case provides a narrow exception to the final judgment rule for that "small class" of prejudgment orders that finally determine claims of right separable from, and collateral to rights asserted in the action, and that are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen*, supra, 337 U.S. at 546. In order to be within the *Cohen* exception, the order must satisfy at least three conditions: It must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. See, *Lauro Lines, s.r.l. v. Chasser*, 490 U.S. 495, 498 (1989). In the instant case, the district court's order of dismissal meets none of these criteria.

It is only where it appears that the district court intends a dismissal to dispose of an action that an order dismissing a complaint may be considered final and appealable. *Gerritsen v. de la Madrid Hurtado,* 819 F.2d 1511, 1514 (9th Cir. 1987). Thus, where the district court refuses leave to amend or finds that an amendment of the complaint cannot save an action, an order dismissing a complaint may be considered an appealable order. See, e.g., *Gerritsen,* supra, 819 F.2d at 1514-15; *Allen v. Veterans Administration,* 749 F.2d 1386, 1388-89 (9th Cir. 1984) (complaint dismissed without leave to amend to add the only proper defendant); *Scanlon v. Atascadero State Hosp.,* 677 F.2d 1271, 1272 (9th Cir. 1982) (dismissal of complaint on the ground that plaintiff's claims were barred), vacated on other grounds, 465 U.S. 1095 (1984).

In the instant case, the district court did not expressly dismiss petitioner O'Leary's action. Rather, the court clearly granted petitioner O'Leary permission to maintain his action by refiling his complaint upon the posting of an appropriate bond. Petitioner O'Leary has never perfected federal appellate jurisdiction because the district court did not dispose of the action.[3]

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[3] The only other basis by which petitioner O'Leary could have invoked appellate jurisdiction is found in 28 U.S.C. Section 1292(a) (interlocutory decisions). Section 1292 is an exception to the congressionally established policy against piecemeal appeals and is a narrow exception "keyed to the need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Monti v. Department of Industrial Relations,* 582 F.2d 1226, 1228 (9th Cir. 1978). Clearly, petitioner O'Leary did not establish the requirements for review pursuant to section 1292. Respondent City of Sacramento is aware of no authority by which an order such as that presented

In this appeal, petitioner O'Leary can establish no basis for appellate jurisdiction. It therefore follows that the instant petition should be denied. Petitioner's brief in support of this petition claims no error by either the district court or the Court of Appeals. Moreover, petitioner has waived any claim of error since petitioner has subsequently paid the vexatious litigant bond. By paying the bond, petitioner O'Leary has voluntarily complied with the district court's condition to refile his complaint.

The instant petition is not a situation of a pro se appellant proceeding in good faith to avail himself of the protection of the law. Rather, petitioner O'Leary, a vexatious litigant, is simply pursuing his baseless harassment of the City of Sacramento at the expense of the federal court system's resources.

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here has ever been considered as an appealable interlocutory order.

## CONCLUSION

For the reasons discussed herein it is respectfully submitted that the Court should deny the petition for a writ of certiorari.

DATED: December 30, 1992

Respectfully submitted,

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**Counsel of Record*

# APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| IN RE: | NO. CIV. |
| JAMES O'LEARY, FLORENCE | S-85-998 RAR |
| O'LEARY, GERALDINE O'LEARY, | NO. CIV. |
| JAMES O'LEARY, JR., RICHARD | S-86-0092 EJG |
| O'LEARY, RONALD O'LEARY, | NO. CIV. |
| individually, and also known as | S-87-328-EJG |
| DIOS LAIGLESIA DE LAITIES DE | NO. CIV. |
| HOLY SACRAMENTO EN DIOS | S-87-1510 EJG |
| | NO. CIV. |
| | S-88-159 EJG |
| | NO. CIV. |
| | S-88-190 LKK |
| | NO. CIV. |
| | S-88-793 LKK |
| | NO. CIV. |
| | S-88-1019 MLS |
| | NO. CIV. |
| | S-88-1139 LKK |
| | NO. CIV. |
| | S-89-0043 LKK |

ORDER DECLARING PLAINTIFFS TO BE VEXATIOUS LITIGANTS AND REQUIRING BOND

The O'LEARY family has filed numerous pro se actions in this court over recent years. Their complaints generally concern two areas. First, interference with property rights, including evictions and frustrated efforts to inhabit various boats on the Sacramento River (*see* Case Nos. Civ. S-88-793 LKK and Civ. S-88-1139 LKK).

Second, constitutional challenges to the City of Sacramento's use of a name alleged to have religious significance (*see* Case Nos. Civ. S-86-0092 EJG, Civ. S-87-328 EJG, Civ. S-87-1510 EJG, and Civ. S-89-0043 LKK).

Cases in the second category have been routinely dismissed for pleading deficiencies, particularly for failure to adequately allege federal jurisdiction. Plaintiffs' repeated efforts to relitigate this faulty claims constitutes an abuse of judicial process.

This court has adopted the statutory provisions of the California Code of Civil Procedure relating to vexatious litigants, for purposes of requiring security in civil cases. Local Rule 233(b). If the court finds that a party is a vexatious litigant, the court may, on its own motion and at any time, require the vexatious party to give security, bond or undertaking in such amount as the court determines to be appropriate.

Under California law, the term "vexatious litigant" includes:

> [A]ny person . . . [w]ho, after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally litigated.

California Code of Civil Procedure section 391(b)(2).

The court finds that the complaint concerning the name "Sacramento" filed by plaintiffs constitutes an attempt to relitigate the validity of the court's final determinations in prior cases. Accordingly, the court holds that as far as that subject matter is concerned, plaintiffs are vexatious litigants and makes the following order:

Before filing any documents or cases concerning a First Amendment challenge to the name "Sacramento," any of the above-mentioned plaintiffs shall give security by posting a bond in the amount of One Thousand Four Hundred Fifty Dollars ($1,450), to be used for payment of such costs and damages as may be incurred or suffered by any party as a result of further documents presented to the court by plaintiffs.

Plaintiffs are warned that further actions on their part reflecting disrespect for the court's process and orders may constitute contempt. The court will not hesitate to act as necessary to compel obedience to its orders and to vindicate its authority.

IT IS SO ORDERED.

DATED: March 10, 1989.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

---

JAMES O'LEARY,

Plaintiff,

v.

CITY OF SACRAMENTO, a municipal corporation, and CITY OF WEST SACRAMENTO, a municipal corporation

Defendant.

NO. CIV. S-91-925 WBS/ JFM

ORDER

(Filed July 24, 1991)

Before the court is plaintiff's complaint filed July 15, 1991, alleging that the "City Seals" of the Cities of Sacramento and West Sacramento are unconstitutional. After examining the complaint, the court finds that it falls within the scope of this court's March 10, 1989, order requiring plaintiff to post a bond of One Thousand Four Hundred Fifty Dollars ($1,450) "[b]efore filing any documents or cases, concerning a First Amendment challenge to the name "Sacramento. . . . " Because plaintiff has filed the complaint without posting the required bond, the complaint is dismissed without prejudice to refile the complaint within 10 days upon giving security by posting a bond in the appropriate amount.

IT IS THEREFORE ORDERED that plaintiff's complaint be, and the same is, hereby dismissed without prejudice. Plaintiff may refile the complaint within 10 days only upon posting the required bond in the amount of One Thousand Four Hundred Fifty Dollars ($1,450).

DATED: July 25, 1991

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| JAMES O'LEARY, SR.,<br>Plaintiff-Appellant,<br>vs.<br>CITY OF SACRAMENTO, CITY OF WEST SACRAMENTO, a Municipal Corporation,<br>Defendant-Appellee. | No. 91-16288<br>DC#<br>CV-91-925-WBS<br>Eastern<br>California<br>(Sacramento)<br>ORDER<br>(Filed<br>April 23, 1992) |

Before: FARRIS, O'SCANNLIAN and TROTT, Circuit Judges

On March 3, 1992, appellant was ordered to show cause why his appeal from the district court's dismissal of his complaint without prejudice should not be dismissed for lack of jurisdiction. In response, appellant has filed a "petition for writ of certiorari" which requests that this court vacate the district court's March 10, 1989 order which declared appellant and his family members to be vexatious litigants. The "petition for a writ of certiorari" is construed as a petition for writ of mandamus. So construed, the petition is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

The appeal is dismissed for lack of jurisdiction. *See Proud v. United States*, 704 F.2d 1099 (9th Cir. 1983).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES O'LEARY, SR., Plaintiff-Appellant, vs. CITY OF SACRAMENTO, et al. Defendants-Appellees. | ) | No. 91-16288<br>DC#<br>CV-91-925-WBS<br>Eastern California<br>(Sacramento)<br>ORDER<br>(Filed May 29 1992) |

Before: FARRIS, O'SCANNLAIN and TROTT, Circuit Judges

Appellant's petition for rehearing of the April 23, 1992 order is denied. Appellant's suggestion for rehearing en banc of the April 23, 1992 order is denied. The appeal is now closed. The Clerk shall accept no further filings in this appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO. 91-16288
CT/AG#: 91-925

JAMES O'LEARY, SR.

Plaintiff – Appellant

v.

CITY OF SACRAMENTO, CITY OF WEST SACRAMENTO, a Municipal Corporation

Defendant – Appellee

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(Filed Jun 10 1992)

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed.

Filed and entered April 23, 1992.